UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 2

ROGAN BROTHERS SANITATION, INC.
And R&S WASTE SERVICES LLC, a
Single employer and successor,

WASTE SERVICES, INC., AND
ECSI AMERICA, INC. a single employer and
R&S WASTE SERVICES LLC, alter egos,

and

Case Nos. **02-CA-040028**
02-CA-065928
02-CA-065930
02-CA-066512

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, LOCAL 813

RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO GENERAL COUNSEL'S MOTION TO TRANSFER, MOTION TO STRIKE, AND MOTION FOR PARTIAL SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

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PRELIMINARY STATEMENT

Respondents R&S Waste Services LLC ("R&S"), Waste Services, Inc. ("Waste Services") and ECSI America, Inc. ("ECSI") respectfully submit this memorandum of law in opposition to the General Counsel's ("GC") motion to transfer this proceeding to the Board, to strike portions of Respondents' Amended Answer, and to grant partial summary judgment in favor of the NLRB.

As set forth in Respondents' opposing papers, these consolidated cases should not be transferred to the Board since there are disputed issues of material fact which require a trial, *Aztec Concrete, Inc.*, 285 N.L.R.B. 1303 (1987).

In addition, no portion of Respondents' Amended Answer should be stricken. The Answer properly reflects the facts as either known to Respondents, or as previously determined by prior proceedings.

Finally, there is no basis to grant partial summary judgment to Petitioner on any aspect of this disputed case. If anything, based on the prior determinations of the Board partial summary judgment in favor of Respondents would be just and appropriate.

As set forth herein, on June 17th, 2013, an Administrative Law Judge made factual findings and legal conclusions after presiding over a seventeen (17) day trial. Those findings, which were adopted by the Board on April 8th, 2015 and affirmed by the Second Circuit Court of Appeals on June 7th, 2016, are that::

o R & S is not the "successor" to Rogan Brothers; that

o R & S is not the "alter ego" of Rogan Brothers; that

o R & S is not a sham corporation set up to continue the business of Rogan Brothers under a different name; that

o R & S and Rogan were "joint employers" for a seven (7) month period only, from March until October of 2011; that

o R & S and Rogan split and went their separate ways as of October 4th, 2011; and that

o Rogan continued to operate as a separate business after October 4th, 2011.

Those findings warrant partial summary judgment in favor of Respondents, declaring that i) Respondents are not the "successors" or "alter ego's" of ROGAN; that ii) Respondents' are not liable under *Golden State*, and iii) that Petitioner is estopped from attempting to assert liability for any Rogan 1 claims against Respondents 8.5 years after the claim arose.

Prior NLRB Findings

On June 17th, 2013, NLRB Administrative Law Judge Green issued a decision after a seventeen (17) day trial finding that R & S was **not** the successor or alter ego of Rogan, nor a sham corporation established to carry on Rogan's operations under a different name.

According to ALJ Green: "Nor do I conclude that R&S was set up as a sham enterprise or as a disguised continuance of Rogan Brothers in order to allow James Rogan to continue to profit while his creditors were left holding the bag. If anything, the facts go in the opposite direction" *R&S Waste Services LLC,* 2015 NLRB LEXIS 258, *141 (N.L.R.B. April 8, 2015), at *142.

Although ALJ Green found that Rogan and R & S constituted a "joint employer" for a limited seven (7) month period of time between March 2011 and October 2011, he further determined that Rogan continued in business as a separate corporation after October 4th of 2011.

The ALJ's decision was adopted by the NLRB Board on April 8th, 2015, and on June 7th, 2016, adopted by the Second Circuit Court of Appeals.

The NLRB did not file exceptions to the Board's decision, nor did it challenge the Board's finding before the Second Circuit. As such, the prior determination that R & S is not a "successor" or "alter ego" of Rogan Brothers and that Rogan separated from R & S and continued to conduct business on its own is final.

Rogan I

December 17th, 2018 was the first time that the NLRB charged Respondents with any liability for the Rogan 1 2010 terminations, which occurred eight and one-half years earlier.

It is undisputed that Respondent R & S did not legally exist in 2010, that no Respondent was involved in the 2010 termination, and that no Respondent had any dealings, transactions or relationships of any kind with Rogan in 2010.

An NLRB employee advised Respondents' counsel in October of 2016 that they were considering bringing such a claim against Respondents, but the NLRB did not state or calculate the amount of the claim, make a demand for payment of any sum, or assert the claim.

Respondents responded in writing in November of 2016 that there was no legal or factual basis for such a claim. The NLRB did not respond to Respondents disclaimer until the commencement of the December 17th, 2018 proceeding, more than two years later.

The employment terminations in Rogan I which are the factual basis for the Unfair Labor Practice charge against Rogan occurred on or about June of 2010. This act was prior to the incorporation or existence of R & S, prior to any involvement of the R & S entities or principals with Rogan, and prior to the limited, seven month time period for which R & S and Rogan were found to be "joint employers".

On July 23rd, 2010, Unfair Labor Charges were filed against Rogan. No charges were filed against R & S at that time, and as noted, R & S did not legally exist at the time the acts constituting an unfair labor practice occurred, or at the time the charge was filed.

On January 28th, 2011, a Settlement Agreement was reached between Rogan and the Regional Office. R & S was not a party to the Settlement Agreement.

A careful reading of GC's motion papers and their Compliance Specification establishes that the GC uses the word "proceedings" to describe Rogan 1 in a manner which appears to involve R & S. The word does not refer to the bad acts of Rogan, or to the termination of Mr. Smith, Mr. Mercado or Mr. Mattei. That all

occurred before R & S was incorporated and before any R & S entity had any dealings of any kind with Rogan. Rather, the word is used to describe the subsequent legal proceedings brought against Rogan to establish his default under the Settlement Agreement.

GC conflates the events in an effort to paint R & S in a false light and to mislead the Board into believing that R & S was an employer of Smith, Mercado and Mattei at the time they were terminated, or that R & S participated in the decision to terminate their employment from Rogan. R & S was not the employer, did not terminate the discriminatees, and did not participate in the decision to terminate their employment.

Rogan II

The termination in Rogan II, which also involved three individuals, (Roake, Revell and Smith), occurred during the limited seven (7) month period where R & S and Rogan were found to be "joint employers". However, there is no factual basis to award back pay to Roake, Revell or Smith.

In fact, R & S took significant and material steps to comply with the Board's April 8, 2015 Decision & Order. R & S 1) issued offers of reinstatement to the terminated employees in "Rogan II"; 2) expunged their disciplinary records; 3) mailed and posted the required notice of the decision to its employees; 4) supplied a certification to the NLRB that the foregoing actions were taken; and 5) had its counsel transmit a detailed analysis to Kurtzleben showing that no back pay was due for the Rogan II unfair labor practices for various reasons, including the fact that one of the individuals had retired, and because the other individuals had refused employment., [**Exhibit F,** analysis supplied to the NLRB by Respondent's counsel in 2016].

The NLRB did not respond to Respondent's position paper until it commenced this administrative proceeding on December 17th, 2018.

Respondents

Joseph F. Spiezio, III, is the sole member and shareholder of Respondent R & S Waste Services, LLC; of Respondent Waste Services, Inc., and of Respondent ECSI America, Inc.

Rogan has no ownership interest in any of said entities and never did. Likewise, Spiezio has no ownership interest in Rogan Brothers, and never did.

Respondent R & S's first interaction with Rogan arose out of an $850,000 business loan made to Rogan in January of 2011 by non-party Pinnacle Equity Group, Inc.

After making the loan, Pinnacle discovered that Rogan had failed to disclose multiple claims and obligations and had failed to report a significant sales tax obligation.

Rogan defaulted on the loan. When Pinnacle sought to execute upon the collateral it discovered that much of the collateral had been pledged to other lenders, was cross-collateralized, or was subject to inchoate tax claims. Pinnacle was only able to acquire some, but not all of the pledged collateral.

Pinnacle assigned two packer trucks, one chase truck, a front loader truck, and approximately twenty (20%) percent of Rogan's customers to a newly formed entity called R & S Waste. The trucks were in poor condition. The remaining assets, consisting of approximately 64 vehicles and 80% of Rogan's customer base, remained in the control of Rogan, or upon information and belief, were

taken by other creditors. As found by the Administrative Law Judge, Rogan continued to own and operate his business separate from R & S.

R & S then began to build a successful waste hauling business using its own resources and business acumen. Among other transactions, the principal of R & S purchased, for value, a company known as Front Line Waste Services, and changed its name to Waste Services, Inc.

Commencing in 2013 and continuing through 2018, Waste Services and R & S merged, eventually forming one entity known as Waste Services, Inc. The company acquired multiple vehicles using its own earnings, and as of the date that this proceeding was commenced, owned or leased approximately 32 vehicles, none of which were acquired from Rogan.

R & S and Waste Services greatly expanded their customer base, serving commercial establishments, "roll-off" customers, and eventually municipalities for the collection of residential and commercial waste. These were all customers obtained by R & S or Waste Services. None of these entities were customers of Rogan.

GC paints the false impression that Respondents acquired all of Rogan's employees. Not true. Nearly every person employed by R & S, or by Waste Services, was hired directly by R & S or by Waste Services.

All employees of R & S and Waste Services are, and always have been, union employees. They chose to be represented by Local 726 of the International Union of Journeyman and Allied Trades. They deliberately chose not to be represented by Local 813 of the Teamsters Union. Unlike 813, which upon information and belief, is in "critical" status, Local 726 is a financially solvent

union with approximately 71,000 members. Its members have a financially solvent pension and excellent medical benefits.

Not one of the employees of R & S or of Waste Services has ever filed an unfair labor practice charge against R & S, against Waste Services, or against ECSI.

Respondent ECSI is a pay-roll company, similar in concept to ADP. It handles and processes payroll for multiple companies, including R & S and Waste Services. It has fewer than 15 employees and did not exist when the questioned employment terminations were made in 2010 and 2011. ECSI does not own any waste vehicles or containers. It does not perform waste services. It has never dealt with Rogan. It has no supervisors. It does not operate in any location where Waste Service or R & S operated. There is no continuity of operation with any other company, including Rogan or R & S. No employees perform the same tasks, under comparable conditions, or under the same supervisors.

ARGUMENT

POINT I

R&S WASTE SERVICES IS NOT THE *GOLDEN STATE* SUCCESSOR OF ROGAN BROTHERS

The NLRB's alleged basis for imposing "Rogan I" liability upon Respondents is based upon its assertion that R & S Waste is a *Golden State* successor.

In *Golden State Bottling Co., Inc. v. NLRB*, the Supreme Court held that a bona fide purchaser of a business who has knowledge of the seller's ULPs at the time of the purchase and who continues the business without interruption or a substantial change in operations, employee complement, or supervisory personnel, has joint and several liability for remedying the seller's

ULPs. 414 U. S. 168, 174-185 (1975). Two factors must be present to show a *Golden State* successorship. See: *M&J Supply Co. ,* 300 N.L.R.B. 444, 459 (N.L.R.B. 1990). First, there must be a showing that the successor acquired "substantial assets" of the predecessor and continued the business without interruption or substantial change in operation, employee complement, or supervisory personnel. *Id.* Second, it must be clear that the successor had knowledge of the predecessor's unfair labor practice liability at the time of the sale. *Id.* There are myriad reasons precluding a finding that R&S is a *Golden State* successor in this case.

1. GC's eight year delay in raising Golden State Successorship undermines the doctrines applicability.

The NLRB invoked *Golden State* successorship doctrine for the first time in its December 2018 *ex parte* sealed filing in the United States District Court for the Southern District of New York ("SDNY action") under the FDCPA. The ALJ decision in *Rogan I* was issued on December 9th, 2011. GC is silent as to why it waited seven years before raising the issue. GC has never provided a reason why it did not amend its Motion For Summary Judgment in Rogan I to include R&S or add Rogan I liability as an allegation in the Rogan II Consolidated Complaint that it issued in 2012.

Why did GC wait seven years to allege *Golden State* successorship if it was such a clear case?

This question is even more apt in considering that the NLRB continued to prosecute the *Rogan I* case in its petition for enforcement before the United States Court of Appeals for the Second Circuit. The NLRB case search web portal shows the following activity: Application for enforcement in January 2013, Circuit Court Mandate in May 2013, and subpoena and other pleadings filed by the GC during July through September 2014. Meanwhile, the *Rogan II* Consolidated Complaint issued in May 2012. The hearing was held between October 2012 and

January 2013. The GC did not plead *Golden State* in the *Rogan II* Consolidated Complaint even though it was fully aware that it was prosecuting *Rogan I* at the Second Circuit at the same time.

GC's statement in its moving papers that it conducted a diligent search of ROGAN assets after Rogan I is not credible. GC has not presented the Board with an affidavit describing the basis for not including Rogan I liability in the Rogan II Consolidated Complaint or seeking FDCPA attachment against ROGAN in 2012, 2013, 2014, 2015, 2016, 2017 or 2018. Simply stated, the GC's seven year silence undermines the Board's claim that it is clear that the R&S is a *Golden State* successor and the GC should be estopped from pursing this stale claim.

2. The Board has already found that R&S was not ROGAN's successor.

Golden State doctrine imposes liability on a successor. The ALJ found that R&S was not the successor to ROGAN. The NLRB did not file exceptions to the ruling. The NLRB did not attempt to challenge that finding before the Second Circuit when considering R&S's petition for review. The Second Circuit enforced the NLRB's Decision & Order that included the finding that R&S was not the successor to ROGAN. As such, the instant motion for *Rogan I* liability based on successorship must be denied.[1]

3. The Board has already found that ROGAN continued to operate independently from R&S after October 4, 2011.

The Board has already concluded that there is no continuity of operation between R&S and Rogan Brothers after October 4, 2011, the date when they completely separated. *Rogan Bros. Sanitation, Inc.*, 2015 NLRB LEXIS 258, *30 (N.L.R.B. April 8, 2015); *see also id*., *145 ("To the extent that the record can demonstrate a date when there was a complete separation, this

[1] The difference between a *Burns* successor and *Golden State* successor has the common test of continuity of operation. As set forth herein, such continuity is not established irrespective of the finding of the limited single employer period.

would seem to be on or about October 4, 2011."). The U.S. Court of Appeals for the Second Circuit enforced the NLRB's Decision & Order.

The GC in its motion contorts itself trying to represent that the clear language from the ALJ in *Rogan II* (which was not modified by the NLRB panel) says something other than what it does. There was a complete separation between the two entities as of the first week of October 2011 – before the decision in *Rogan I* was issued.

Indeed, as the April 5, 2015 *Rogan II* decision makes clear ROGAN continued to operate independently as ROGAN after the first week of October 2011:

> When James Rogan could no longer pay the bills owed by his company (Rogan Brothers), he obtained a sizeable loan to keep his business afloat, at least for a while. In consideration, Spiezio, via his enterprises, made a loan to Rogan on terms that called for an above market interest rate with the condition that if Rogan Brothers failed, Spiezio would take over much or all of its assets…

R&S Waste Services LLC, 2015 NLRB LEXIS 258, *141 (N.L.R.B. April 8, 2015). In fact, ROGAN continued to operate long after the single employer period ended in the first week in October. *Id.* at *145.

The ALJ further stated:

> Rogan Brothers continued to perform, with employees on its own payroll, carting services for customers who had been taken over by R&S after August 1, 2011 (when R&S took legal title to some but not all of Rogan Brother's assets),

Id. at *145; *see also id.,* at *96 ("The record indicates that after the transfer of assets from Rogan Brothers to Pinnacle to R&S on August 1, 2011, James Rogan, either through Rogan Brothers, ARJR, or other entities, continued to be involved in the waste business, but on a reduced scale.")

Based on the findings set forth in the April 8, 2015 Decision & Order, it is clear that ROGAN was not extinguished and reborn only as R&S Waste.

According to ALJ Green:

> Nor do I conclude that R&S was set up as a sham enterprise or as a disguised continuance of Rogan Brothers in order to allow James Rogan to continue to profit while his creditors were left holding the bag. If anything, the facts go in the opposite direction. Spiezio was not a tool used by James Rogan to continue to operate his business while evading his creditors. On the contrary, it is my opinion that Spiezio took advantage Rogan's distress so that in the event of a defaulted loan, he could pick over the bones of the business and take the choice pieces for himself.

Id. at *142.

There can be no dispute based on the record that ROGAN remained an operating business after the first week of October 2011. *Id.* at *30. As such, the record does not support a finding that R&S succeeded ROGAN. Since *Golden State* imposes liability on a successor and R&S has already been found **not** to be a successor to ROGAN, *Golden State* is inapplicable to the facts of this case. Consequently, R&S cannot be liable for *Rogan I* backpay and the instant motion must be denied.

4. There was no bona fide purchase of assets.

There is no dispute that R&S did not purchase a single asset from ROGAN. Indeed, GC has not pointed to a single asset purchased by R&S. As set forth above, Pinnacle Equity loaned funds to ROGAN (which is not in dispute) and foreclosed on the loan (which is not in dispute). Pinnacle Equity assigned a limited amount of assets to R & S (4 vehicles and a small percentage of commercial contracts in Westchester County only- an undisputed fact). As seen from the SDNY action, ROGAN had 68 vehicles during the relevant period. As such, the four vehicles Pinnacle Equity seized and then assigned to R&S cannot remotely be considered a purchase of "substantial assets" by R & S from ROGAN..

GC, recognizing no ability to argue the typical *Golden State* scenario of a "substantial asset purchase", strains, unsuccessfully, to conjure a new theory of *Golden State* successorship.

GC chiefly relies upon *Ponn Distributing*, 232 NLRB 312 (1977) in an unpersuasive attempt to work around the fact that there was no purchase of "substantial assets" in this case. *Ponn* is distinguishable.

Ponn, by "financial and other arrangements, and under conditions somewhat similar to obtaining a franchise from Cott, assumed the distribution in the Worcester-Leominster-Fitchburg sector of products bearing the brand name of 'Cott'". 232 NLRB at 483. Ponn committed various ULPS during an organizing drive after Ponn began to operate. Two years after Ponn took over Cott's operation, Ponn ran into financial difficulties, Cott canceled Ponn's distributorship and foreclosed on its security interest in Ponn's assets. 232 NLRB at 313. Cott then resumed its operation as they existed prior to contracting with Ponn. The Board found that Cott, which resumed its business, was liable for the ULPs incurred by Ponn when operating the same business under Ponn's name. Nothing like that happened here.

In *Ponn*, the successor (Cott) took back its own assets and resumed operation of what was essentially the same business it had engaged in before its business relationship with Ponn. Under those facts, the Board determined that Cott would be liable for ULPs incurred by Ponn when it conducted essentially the same business under a different name. In this case. R&S did not have a pre-existing business, nor did it take back its own assets. Instead, a third party, Pinnacle foreclosed on certain assets of ROGAN and then assigned those assets to R&S. ROGAN continued to own the bulk of its assets, including vehicles, customers and employees and continued to operate its own, independent business.

In *Ponn*, the successor (Cott) resumed total control and operation of the business that it franchised to the predecessor (Ponn). Here, R&S operated only certain commercial contracts solely within Westchester County and only with 4 of ROGAN's 68 vehicles. R&S did not

operate any ROGAN municipal contracts in Westchester County and did not perform any ROGAN work in New York City or Connecticut. In fact, R & S did not have a license to operate in those locations.

GC's citation to *Hot Bagels & Donuts*, 244 NLRB 129 (1979) is similarly misplaced. Hot Bagel's had a bank loan secured by its assets. *Id.* at 130. Hot Bagel's couldn't make loan repayments and the bank foreclosed on the assets. *Id.* The assets were put up for auction and the bank was the successful bidder. Id. The bank approached Hot Bagel's owner to see if he wanted to get back into the business by entering into a lease agreement with the bank for the foreclosed assets of Hot Bagels. *Id.* The owner agreed and set up a new company, Amboy. *Id.* Amboy took over the operation of Hot Bagels in its entirety, serving the same customers, in the same locations, using the same equipment and personnel. Amboy would make lease payments to the bank and upon payment of the entire amount of the Hot Bagel's loan that was foreclosed on Amboy would take ownership of the assets. *Id.* at 131.

The Hot Bagel's transaction is not even remotely close to the circumstances here. R & S was not previously in the waste hauling business. It did not pledge and then reclaim its assets to conduct the same business under a different name. Instead, the pre-existing business, ROGAN, obtained a loan by falsely pledging assets that were already encumbered. Upon default, the lender only obtained a portion of the collateral it needed to recover upon its loan. In an effort to maximize its recovery, the lender assigned the few assets it did obtain to a newly established entity, not owned by the borrower ROGAN, which then engaged in the waste hauling business. That business was only conducted in a portion of ROGAN'S service territory, and only serviced twenty (20%) of the borrower's pre-existing business. The remaining 80% of the borrower's business remained in the control of the borrower, along with 90% of the borrower's vehicles.

ROGAN continued to operate its assets and business in New York City and Connecticut, and continued to operate its municipal contracts in Westchester County. R & S did not operate in NYC or Connecticut, and did not operate ROGAN's municipal contracts in Westchester,

GC has not cited a single case with comparable facts, or a case which warrants the imposition of predecessor ULP liability under *Golden State*. Consequently, the motion for partial summary judgment must be denied.

5. **Board law precludes *Golden State* liability based on the facts here**.

The Board, subsequent to *Golden State,* has declined to find successors liable for their predecessors' unfair labor practices in cases where it has found that the successor's potential liability could not have been reflected in the transaction price or appropriately addressed by an indemnity clause. *Lebanite Corp.*, 346 N.L.R.B. 748 (N.L.R.B. 2006). Thus, in *Glebe Electric*, 307 NLRB 883 (1992), the Board rejected General Counsel's contention that Aneco Co., an electrical contractor, was a *Golden State* successor to Glebe Electric, even though Aneco had taken over a contract abandoned by Glebe and had used some of the facilities formerly used by Aneco. The Board noted that the rationale stated in *Golden State* and *Perma Vinyl Corp.*, 164 NLRB 968 (1967), for imposing liability on a purchaser for the unfair labor practices of the seller, was that the purchaser could reflect its potential liability in a negotiated purchase price or through indemnification by the seller. The Board concluded that Aneco had no opportunity to insulate itself from liability for Glebe's violations, and as such, would not face liability under *Golden State.*

Here, because R&S did not purchase a single asset of ROGAN (nor did Pinnacle Equity) R&S did not have the opportunity to negotiate a lower price to reflect the liability risk, not an opportunity to negotiate an indemnity clause to protect itself against the risk associated with an

unfair labor practice liability. As such, *Golden State* liability cannot attach. *Peters v. NLRB*, 153 F.3d 289, 300-302 (6th Cir. 1998) (denying Board's enforcement that an employer was a Golden State successor).

In this case a lender, Pinnacle, attempted to secure a loan agreement by taking a security interest in what it thought was all of the borrower's assets. However, after making the loan Pinnacle discovered that many of the assets were already pledged to another creditor, or were subject to cross-collateralization agreements to secure other vehicle purchases, or were subject to an inchoate sales tax obligation which might have priority over Pinnacle's security interest. Attempting to make the best of a bad situation, Pinnacle assigned the paltry assets it did receive, 4 broke tnrucks and a handful of waste hauling contracts, to a newly formed entity, R & S, that had never been in the waste hauling business. R & S never had an opportunity to negotiate a sales price to reflect the risk of then unknown ULPs, nor did it have an opportunity to negotiate an indemnification agreement. R & S did not know of the ULP claim or liability when Pinnacle made the loan, and ROGAN was not in a position to meaningfully indemnify R & S. R&S had no relationship (directly or indirectly) in being assigned the limited assets therefore it had no opportunity to insulate itself from ROGAN ULP liability. Notably, GC did not allege in *Rogan II* that Pinnacle Equity was either a single employer with R&S or the alter ego of R&S. Thus, there can be no imputation of Pinnacle Equity's actions upon R&S.

Also, as *Lebanite* holds, a successor must have had a meaningful opportunity to insulate itself from liability. *Lebanite Corp.*, 346 N.L.R.B. 748, 751 (N.L.R.B. 2006). Where the predecessor company is in a precarious financial state the purchaser does not have a meaningful opportunity to insulate itself from liability through an indemnification agreement. *Id.* (reversing ALJ where the predecessor company was in poor financial condition and therefore it was "not

reasonable to believe that an indemnification clause would have protected" the successor.) Here, there was no dispute that ROGAN was financially crippled when Pinnacle extended the loan to ROGAN. Under *Lebanite*, even assuming *arguendo* R&S purchased assets, ROGAN's poor financial condition precluded ROGAN from protecting R&S from ROGAN's unfair labor practice liability. Consequently, the instant motion must be denied.

Another point to consider is that the Pinnacle loan could have been called in at any time. In *Lebanite*, the alleged successor leased property from the alleged predecessor. There was a provision in the lease agreement that it could be terminated within 30 days. *Id.* at 752. The Board reversing the ALJ's successor finding stated that because the lease was "terminable by either party on 30-days' notice, [the alleged successor's] total payments under the lease could have amounted to far less than the potential unfair labor practice liability." *Lebanite, supra*, at 750. Here, Pinnacle Equity could have ceased extending amounts under the loan at any time and therefore any amount extended at termination time could have been less than the amount of the unfair labor practice liability. Under *Lebanite*, *Golden State* successorship can't be established, and the instant motion must be denied.

6. R&S did not have notice of ROGAN's ULPs.

R&S could not have had notice of ROGAN's unfair labor practice. Pinnacle Equity's loan to ROGAN was in January 3, 2011. There is no evidence that Spiezio was aware of or had any involvement in ROGAN's unfair labor practices prior to that date. Indeed, GC cites only to evidence post-loan agreement to support GC's argument that Spiezio was aware of such ULPs. The clear lack of notice precludes *Golden State* successorship.[2]

[2] GC argues that the January security agreement was not perfected until March. This is a meaningless, and irrelevant argument. Under NY law the security agreement was created in January. The fact that it was not entitled to a priority against other potential creditors until it was recorded in March does not change the fact that

Moreover, since R&S did not purchase ROGAN assets there was no ability for R & S to have effectively negotiated a method of insulation from liability for Rogan's unfair labor practices. Consequently, an essential element of *Golden State* is absent, and the motion must be denied.

7. Golden State's policy concern is not implicated.

Golden State's policy provenance is that employees who were subject to a ULP will have the ability to obtain the remedy. Discovery produced during *Local 813 Trustees et al v. Rogan Brothers Sanitation*, et al, in the United States District Court for the Eastern District of New York, 12-CV-6249, ("SDNY action") revealed volumes of information establishing that Rogan Brothers Sanitation, Inc. continued to operate as a viable and separate entity from R &S Waste during March 2011 through October 4, 201 and for years after the *Rogan I* December 2011 decision. R & S Waste asks the NLRB to take judicial notice of the documents and filings submitted during the summary judgment phase evidencing the independent viable operation Rogan Brothers engaged in. In particular, R & S refers the NLRB's attention to the Local Rule 56.1 Statement it submitted and has attached to the Spiezio affidavit here.

R&S identifies the following salient facts (though not exhaustive) showing that ROGAN continued to operate as a separate entity long after the ALJ in *Rogan II* found that there was a complete separation between ROGAN and R&S after the first week of October 2011. As such, R&S cannot be found to be a *Golden State* successor or liable in any way for remedying *Rogan I* backpay.

- ROGAN was licensed to operate in New York City. SMF ¶ 27.1. R&S has never had a license to operate in New York City.

ROGAN was insolvent, and that R & S never had a meaningful opportunity to protect itself by purchasing the assets at a discount or by obtaining a meaningful indemnification agreement.

- ARJR Trucking ("ARJR") (an affiliate of ROGAN) was a signatory to a collective bargaining agreement with Local 813for the period December 1, 1999 through July 31, 2002. Id., ¶ 30.
- A modification agreement was signed by ARJR and Local 813, which provided that all bargaining unit employees of ARJR were employed by ROGAN as of January 9, 2002. Id., ¶ 31.
- ROGAN was a signatory to union contracts other than Local 813, during 2011, 2012 and 2013, i.e. Local 456, and Local 282, . SMF, ¶ 41.
- R & S was not a signatory to these union contracts, nor did R & S have any relationship, employees, or negotiations with Local 456 or Local 282;
- Local 456 Trust Funds produced a collective bargaining agreement between Rogan Brothers and Local 456, IBT signed by Rogan Brothers on August 17, 2012. Id., ¶ 379.
- Local 282 Trust Funds produced a document entitled "Audit Worksheet Control Information" for the period September 26, 2008 through June 27, 2011 that lists "James Rogan as 100% shareholder" and that Rogan Brothers has "non-signatory affiliates" of ARJR Trucking Corp., Saw Mill Recovery, Inc., Sprain Road Associates Inc., Finne Brothers Refuse Systems, Inc." Id., ¶ 372. R & S was not listed.
- Hauling construction and demolition material, e.g. rock and dirt, was not covered work under the Local 813 CBA. Id., ¶ 44.
- Rogan Brothers operated interchangeably as ARJR and eventually operated under ARJR after October 2011. Id., ¶ 45.1.

- ARJR vehicles operated out of the same yard as Rogan Brothers in Yonkers doing the same work that Rogan Brothers performed. ¶ 46.
- An ARJR check dated February 28, 2012 (a date months after the ALJ in Rogan II determined that there was a "complete separation" between ROGAN and R&S) is payable to the Solid Waste Commission in the amount of $25,000.00 and has what appears to be the name James Rogan listed in the signature block. Id., ¶ 229.
- ROGAN pledged specific assets as collateral to Pinnacle Equity (the entity that loaned ROGAN funds in early 2011). Id. ¶ 57.
- ROGAN pledged approximately 15% of its customer routes as collateral, certain trucks, and other equipment. Id., ¶ 58.
- Not all of ROGAN's assets were used as collateral. Rogan Brothers insurance policy for equipment included 68 vehicles and pieces of equipment. Id., ¶ 59.
- Rogan Brothers had in excess of 6800 customers in early 2011. Id., ¶ 60.
- Rogan Brothers posted only commercial contracts of approximately 1,100 customers as collateral. Id., ¶ 61.
- Pinnacle Equity and ROGAN mutually agreed in May 2011 that instead of proceeding to litigation for ROGAN's failure to repay the loan, ROGAN would relinquish its right to the collateral it posted when it obtained the loan. Id. ¶ 95.
- ROGAN did not surrender its roll off trucks because James Rogan needed them to continue to do business. Id., 97.
- ROGAN only surrendered two packer trucks, a front loader and a chase truck. Id., 98.

- The equipment that Pinnacle took possession of was cross-collateralized and had liens against it by other entities such that Pinnacle did not have control over those assets Id., 99.
- Pinnacle did not assume customers that were under contract with ROGAN. Id., 100.
- ROGAN continued to service those contracts. Id., 100.1
- ROGAN did not post as collateral its customers located in New York City customers.
- R&S had not authority or a permit to operate within New York City. ¶ 102.
- James M. Rogan sent many ROGAN customers to his other company, A.R.J.R. Trucking Corp. Id., ¶ 103.
- ROGAN retained 80% of its equipment and vehicles. Id., ¶ 104.
- ROGAN did not surrender computers or office equipment. Id., ¶ 105.
- R&S could not operate under ROGAN's waste hauling permits. Id., ¶ 149.
- R & S serviced only 20% of customers that had been served by ROGAN. Id., ¶ 152.
- R & S did not operate out of ROGAN's Bedford yard (Id.,¶ 108,109);
- R & S employees did not work in Connecticut whereas ROGAN' employees did work. (Id.,¶ 147);
- R & S employees did not work on ROGAN municipal contracts whereas ROGAN employees continued to work after October 2011. (Id.,¶ 62).
- R & S purchased new vehicles. (Id.,¶145);
- Spiezio, was the only person authorized to hire and fire at R & S. (Id.,¶ 124).
- R & S's employees were represented by Local 726, IUJAT. (Id.,¶ 157)
- ROGAN's employees were not represented by Local 726;
- James Rogan had no role at R & S. Id.,¶ 73.

- ROGAN employed approximately 113 people in 2011. Id., ¶ 321
- R & S began operating in August 2011 and hired only approximately 25 ROGAN employees. Id.,¶ 107,128
- Employees hired by R & S were not members of Local 813, IBT when hired. SMF¶ 128
- The companies used different accountants. Id.,¶ 113.
- R & S maintained an independent bank account at First NBC and Rogan was not an authorized user. Id.,¶ 123.
- The companies maintained separate office space, separate phone numbers and fax numbers. Id.,¶ 148-148.1. R & S used email. Id.
- ROGAN had a website and R&S did not. Id.
- Spiezio did not control matters with Local 456 or with Local 282, – the other unions that represented ROGAN' employees. Id.,¶ 81.
- The companies used different billing systems (Id.,¶ 136) and there was no transfer of files. Id., ¶¶ 136-137
- The market and customers of R & S and ROGAN were dissimilar
- ROGAN remitted contributions for employees in 2012 and 2013. Id.,¶ 41, 379.
- Local 282, Benefit Funds production in the SDNY action showed that ROGAN employees continued to work hours for which contributions were required into April 2013. Id.,¶ 41, 371-377;
- ROGAN continued to conduct business as ARJR as evidenced by the checks to individuals in 2012 whom were employees of ROGAN (Id.,¶ 327-328) and checks payable to ROGAN dated in 2012 deposited in ARJR bank accounts. Id.,¶ 226.

- The Local 282 fringe benefit funds produced a document in response to subpoena served by R&S and Spiezio entitled “Local 282 Trust Funds – Employer Work History Rpt” that lists hours of work for employees starting in 2008 and continuing to April 2013. Id., ¶ 371.
- Local 282 Funds notified Rogan Brothers in a document dated August 6, 2012 of the amounts of contributions owed to the Local 282 Funds for the period of January 1, 2011 through September 2012 – almost a year after the ALJ in Rogan II found that there was a “complete separation” between ROGAN and R&S. Id., ¶ 374.
- Local 282 Funds produced a check with the name Aida Rogan appearing in the signature block dated February 23, 2012 payable to the Local 282 Funds drawn on what appears to be a Rogan Brothers Sanitation account. Id., ¶ 375.
- Rogan Brothers settled a lawsuit brought by the Local 282 Funds in 2016. Id., ¶ 376.
- Local 282 Funds produced a document entitled “Local 282 Trust Funds – Receipt Detail Report” showing that Rogan Brothers remitted contributions to the Local 282 Funds in December 2011 through September 2012. Id., ¶ 378.
- In a check dated August 20, 2012, an entity called Dragados paid $340,000.00 to the Local 456 Trust Funds noting under the check stub’s heading “Invoice” the date “8-20-12” and under the heading “Description” stating “Rogan, Union” dated August 20, 2012. Id., ¶ 380.

These facts are vital in understanding why *Golden State* successorship is precluded. In *Golden State*, the Supreme Court upheld the Board's remedial doctrine permitting the imposition of derivative liability on a bona fide successor employer who acquires and continues the business of a predecessor with knowledge of the predecessor's unremedied unfair labor practices. *Roberts*

v. Local 910, IBEW, 333 N.L.R.B. 987, 988 (N.L.R.B. 2001). This equitable doctrine involves a balancing of the legitimate interests of the bona fide successor, the public, and the employee victims of an unfair labor practice. *Id.* The balancing process emphasizes the need for protection of those employee who may be "without meaningful remedy when title to the employing business operation changes hands." *Id. citing Perma Vinyl*, 164 NLRB at 969.

The foregoing undisputed facts show that ROGAN was a viable entity fully capable of satisfying the backpay component of *Rogan I* at all relevant times. ROGAN had the means to remedy the ULPs during the single employer period of March 2011 to October 4, 2011 because as set forth above ROGAN operated in New York City and Connecticut and operated its municipal contracts in Westchester County independent of R&S. Indeed, GC strains to ignore this critical evidence that was in many respects part of the *Rogan II* record (for example affidavits by James Rogan explaining as much and cited to by the ALJ).

The ignored evidence from the *Rogan II* and the SDNY action also show that ROGAN was fully capable of remedying the backpay of *Rogan I.* These facts vitiate the entire purpose of *Golden State* successorship liability – ensuring "victims" of predecessor's ULP will have the ability to be remedied. Therefore, *Golden State* is inapplicable and the motion for summary judgment must be denied.

Golden State is also inapplicable based on these facts because the doctrine applies where the successor company purchases "substantial assets" of the predecessor. *Golden State,* 414 U.S. at 184, 94 S.Ct. at 425. As the record demonstrates, R&S only received four vehicles from Pinnacle Equity out of a universe of 68 vehicles that ROGAN had. R&S did not receive any other ROGAN equipment. R&S did not get assigned any of ROGAN's municipal contracts..

R&S did not receive any ROGAN customers in New York City or Connecticut and was not licensed to operate in those areas..

ROGAN has always remained solely responsible for remedying the ULPs. The GC was asleep at the switch for years in not trying to force ROGAN to remedy the *Rogan I* ULPs in 2012, 2013, 2014, 2015, 2016 and 2017. The GC has never bothered to explain why it did not seek relief at the Board or in court for all those years when ROGAN was clearly operating and had the resources to remit any backpay that may have been owed (e.g. it remitted benefit funds contributions, paid a settlement of $150,000.00 and operated under ARJR). In fact, by the GC being derelict in its duties in 2012, 2013, 2014, 2015, 2016, 2017 and 2018 it allowed the backpay period for *Rogan I* to unjustifiably swell. R&S should not be held responsible for the GC's failure to do its job. The invocation of *Golden State* eight years after the fact is without basis in law (GC has failed to cite a single case where Golden State applied in the circumstances present here) and represents an abuse of its authority. The Board cannot reward the GC's lack of diligence in performing its statutorily required duty. The instant motion for partial summary judgment is frivolous and must be denied.

POINT II

BACKPAY FOR THE DISCRIMINATEES IN ROGAN I IS UNWARRANTED

By waiting eight years to assert *Rogan I* liability upon R&S, GC has deprived R&S of the ability to offer reinstatement to the discriminates (assuming *arguendo* it was a *Golden State* successor) at any time over those eight years. This is substantially prejudicial to R & S and as such, the backpay period must be tolled and the Board estopped from asserting any such claim.

Second, no backpay is owed because a discriminatee in *Rogan II* testified that in October 2011 the president of Local 813 advised him that there were driver positions available at other

waste companies. This evidence establishes equivalent opportunities for the *Rogan I* discriminatees as of October 2011 thereby cutting off the backpay period at that time.

Third, R&S is being deprived of its constitutional due process right to challenge the backpay calculations for Rogan I liability through the Board's process specifically designed to provide a respondent due process. The determination of backpay liability is highly factualized and R&S is not being accorded its right to use the devices necessary to defend itself.

POINT III

THERE IS NO BACKPAY LIABILITY IN *ROGAN II*

Relevant to denying the motion to strike portions of Respondents' Amended Answer with respect to the *Rogan II* backpay claim, and also relevant to the motion for partial summary judgment, is the fact that there is no evidentiary basis to support an award of backpay to the discriminatees. As set forth below, GC's compliance officer, Rachel Kurtzleben never bothered to provide a refutation to the following analysis R&S provided to her in 2017. As such, all denials and affirmative defenses asserted with respect to the *Rogan II* discriminatees are proper and the motion to strike must be denied.

1. **Wayne Revel:**

Regarding overtime, according to the attached payroll report for Revel's entire tenure, he averaged less than one hour per overtime per week. The report reflects hours based on Revel being paid on bi-monthly basis. As such, the four hours of overtime assumed in his backpay calculation are unsupportable and is to be reduced accordingly.

Notwithstanding the foregoing, while there is a presumptive rule allowing a discriminatee a 2-week period to begin his or her search for work following a discharge the rule is subject to rebuttal. *Rose Fence, Inc.*, 2016 NLRB LEXIS 838, *24 (N.L.R.B. Nov. 29, 2016). Revell

testified on January 8, 2013 that the day he was told he was being laid off was the same day he was invited to apply to R & S. Revell testified he needed some time to think about the offer and indeed – "took time off" before applying to R & S. Revel further testified in response to the ALJ's question that it was his (Revel's) decision not to apply the moment the R & S job was offered. Revel further testified that James Troy, the 813 president at the time, sent Revell the names of employers that were hiring and Revell chose not to seek that employment. As such, the presumption has been rebutted with Revell's testimony and no backpay is owed. Id. at *26-27 ("I find it consistent with extant Board law to terminate the Respondent's ongoing backpay obligation at a time when: it has established that work was available for the laid off employees; it has shown that employees were aware of the option to seek return to work"); *Knickerbocker Plastic Co.*, 132 NLRB 1209, 1219 (1961) (recognizing that it is incumbent on a claimant to seek a job for which he has extensive experience)

In *St. George Warehouse I*, the Board held that once a respondent produces evidence that there were substantially equivalent jobs in the relevant geographic area available for a discriminatee during the backpay period, the General Counsel has the burden of producing evidence regarding a discriminatee's job search. Revell's testimony clearly demonstrates other jobs were available – as such the General Counsel is required to show what efforts Revell made to find employment. The General Counsel's brief is bereft of any such evidence.

Given the foregoing there is no backpay owed to Revell and the instant motion must be denied.

2. Roake:

Roake has represented that he retired as of October 2012. R &S understands that his retirement date was earlier than October 1, 2012. The General Counsel needs to provide a sworn

statement about the date of his retirement. As such, the backpay calculation is to be reduced by three months along with the tax calculation and interest in light of his actual retirement date. It is also R & S understands that Roake worked for City Carting and as such the backpay amount claimed is incorrect.

As to the overtime assumptions, they too are overstated. As set forth in the Revel payroll report, Roake, a roll off driver like Revel, at best would have worked approximately one hour of overtime per week (at most $39.96 in overtime) from October 2011 until he retired on July 1, 2012. As such, the overtime assumption of four hours per week is to be reduced accordingly.

On October 18, 2012, Roake testified that he was told employment was available at R & S but declined to apply. Since a roll off job was available at R & S and he chose not to apply, Roake failed to mitigate his damages thereby cutting off backpay completely and none is due. *Rose Fence, Inc.*, 2016 NLRB LEXIS 838, *26-27 (N.L.R.B. Nov. 29, 2016) ("I find it consistent with extant Board law to terminate the Respondent's ongoing backpay obligation at a time when: it has established that work was available for the laid off employees; it has shown that employees were aware of the option to seek return to work").

Notwithstanding the foregoing, there are literary hundreds of sanitation companies for which Roake could have applied to for employment. While Roake is not permitted to limit his backpay to sanitation companies, the prodigious amount of companies makes his claim of not being able to find employment absurd. A fact supported by his claim that he drove no more than 90 miles in a one year period looking for employment – less than 1.7 miles per week. *Contractor Servs.*, 351 N.L.R.B. 33, 2007 NLRB LEXIS 393, 183 L.R.R.M. 1049, 20067 NLRB Dec. (CCH) P17,442, 351 NLRB No. 4 (N.L.R.B. 2007) (contacting less than one employer per month not diligent effort); *Knickerbocker Plastic Co.*, 132 NLRB 1209, 1219 (1961)

(recognizing that it is incumbent on a claimant to seek a job for which he has extensive experience). R &S will need to be provided evidence of the companies he applied to provide additional analysis of Roake's failure to undertake reasonably diligent efforts to mitigate.

Notwithstanding the foregoing, as Revell testified on January 8, 2013, James Troy, the union president had names of companies that had open roll off positions available in October 2011. The assumptions for Roake indicate he couldn't find work at all – the evidence contradicts the assumptions and therefore the calculations must reflect no backpay due because he failed to undertake reasonably diligent efforts to find employment that the union's testimony at trial shows was available.

In *St. George Warehouse I,* the Board held that once a respondent produces evidence that there were substantially equivalent jobs in the relevant geographic area available for a discriminatee during the backpay period, the General Counsel has the burden of producing evidence regarding a discriminatee's job search. Revell's testimony clearly demonstrates other jobs were available. As such general counsel is required to show what efforts Roake made to find employment. The General Counsel's brief is bereft of any such evidence.

Given the foregoing there is no backpay owed to Roake and the instant motion must be denied.

3. Smith:

As to the overtime assumptions, they too are overstated. As set forth in the Revel payroll report, Smith, a roll off driver like Revel, at best would have worked approximately one hour of overtime per week (at most $40.23).. As such, the overtime assumption of seven hours per week is to be reduced accordingly to no more than one hour per week.

Also, Smith's W-2 for 2011 from Rogan Brothers shows that he earned $40,103.11. Smith says his last day of employment was October 4, 2011. Thus, from the beginning of January 2011 through October 4, 2011 Smith earned $40,103.11. Assuming the time he worked equates to 41 weeks, Smith earned approximately $978 per week at Rogan. Assuming he worked through the end of 2011, he would have earned an additional $10,759.37 (using 11 more weeks of the year x $978). Thus, in 2011 he would have earned $50,862.48. The calculations the Board provided for Smith show a quarterly wage of $17,607 had he continued to be employed at Rogan, which equates to $70,428.00 per year in alleged owed backpay. Based upon his 2011 W-2, it is seen that Smith's calculations are erroneously inflated by approximately $20,000 per year or $80,000 over the life of the backpay period. Based upon the 2011 W-2, Smith's quarterly income was $12,715.62. Since his interim earnings were $15,600, no backpay is due.

Notwithstanding the foregoing, Smith is not entitled to any backpay for another reason. Smith testified on October 17, 2012 that he was told that R & S was hiring and testified that he chose not to apply. As such, Smith failed to mitigate his damages and no backpay is owed. Of course, driving a roll off truck in the same geographic area for R & S would have been a suitable and substantially equivalent job – his admitted failure to apply precludes backpay. *Rose Fence, Inc.*, 2016 NLRB LEXIS 838, *26-27 (N.L.R.B. Nov. 29, 2016) ("I find it consistent with extant Board law to terminate the Respondent's ongoing backpay obligation at a time when: it has established that work was available for the laid off employees; it has shown that employees were aware of the option to seek return to work"); *Knickerbocker Plastic Co.*, 132 NLRB 1209, 1219 (1961) (recognizing that it is incumbent on a claimant to seek a job for which he has extensive experience).

Notwithstanding the foregoing, as Revell testified on January 8, 2013, James Troy, the union president had names of companies that had open roll off positions available in October 2011. The assumptions for Smith indicate he couldn't find work in 2011 and early 2012 – the evidence contradicts the assumption and therefore the calculations must reflect no backpay due because he failed to undertake reasonably diligent efforts to find employment. *Knickerbocker Plastic Co.*, 132 NLRB 1209, 1219 (1961) (recognizing that it is incumbent on a claimant to seek a job for which he has extensive experience).

In *St. George Warehouse I*, the Board held that once a respondent produces evidence that there were substantially equivalent jobs in the relevant geographic area available for a discriminatee during the backpay period, the General Counsel has the burden of producing evidence regarding a discriminatee's job search. Revell's testimony clearly demonstrates other jobs were available – as such general counsel is required to show what efforts Smith made to find employment. Please provide the information for further analysis.

Notwithstanding the foregoing, there are literary hundreds of sanitation companies for which Smith could have applied to for employment. *See* Spiezio Aff. ¶ . The wages of the companies are likely comparable to what he was paid at Rogan. *Id.* R & S having carried its burden will be entitled to see what Smith's efforts were in securing interim earnings. The General Counsel's brief is bereft of any such evidence.

Given the foregoing there is no backpay owed to Smith and the instant motion must be denied.

It must be noted that R&S responded to the Board's backpay computations in response to a request for a response made by Board Agent Rachel Kurtzleben in the end of 2016. R&S's response was similar to what was provided to the Board in or about February 2017. *Id.* The

Board did not refute or challenge R&S's analysis. *Id.* The next time R&S heard from the Board regarding the backpay claim of Revel, Roake and Smith was when it filed its *ex parte* sealed order of attachment under the Federal Debt Collection Procedures Act in December 2018. The Board's almost two year silence in offering any refutation to R&S's analysis undermines its claim now that the backpay amounts are credible. The instant motions seeking to strike certain denials and allegations that would solidify GC's unsupportable backpay calculations must be denied. Similarly, the motion for partial summary judgment seeking to establish liability for unsupportable backpay amounts must be denied.

POINT IV

THE MOTION TO STRIKE IS MOOT

1. The Board's finding of a limited single employer period is not dispositive.

a. GC's amendment to the Backpay Specification shows why R&S denials and affirmative defenses are proper.

The GC contends, in part, that R&S's denials and affirmative defenses are moot because the Board has already found that R&S and ROGAN were a single employer for a period of time. The single employer finding, according to GC, conclusively establishes the imposition of *Rogan I* liability upon R&S. As such, R&S cannot "seek to relitigate" decided issues nor can it deny certain allegations. GC is incorrect because it misstates the *Rogan II* finding and ignores the facts.

GC's original Backpay Compliance Speciation alleged the following at ¶2(e):

> Beginning on or about August 1, 2011, Joseph Spiezio continued to operate Respondent Rogan's commercial sanitation and roll-off business as Respondent R&S in basically unchanged form.

GC's changed the allegation in its Amended Specification:

> Beginning on or about August 1, 2011, Joseph Spiezio continued to operate Respondent Rogan's commercial sanitation and roll-off business in ***Westchester 'County, New York*** as Respondent R&S in basically unchanged form. (emphasis added).

The "slight" change to the allegation is, in fact, substantial. The *Rogan II* Consolidated Complaint did not make that distinction nor did the Board's decision. GC is now trying to modify history to ensure it can establish the "continuity of operation" requirement of *Golden State*. GC's salve of narrowing the geographic scope is of no help.

The *Rogan II* record establishes that R&S did not operate in New York City or Connecticut during the limited single employer period.[3] It also establishes that ROGAN neither ceded to Pinnacle or R&S any of its municipal contracts in Westchester County nor stopped operating those contracts during the limited single employer period. GC can't show "continuity of operation" for *Golden State* purposes if it pursued the original allegations that R&S took over ROGAN's operation in "unchanged form" with no geographical limit. It must also not be forgotten that *Rogan II* included the finding that R&S was not the alter ego of ROGAN precisely because of these facts – GC never filed exceptions on that finding.

Moreover, and critically lacking from GC's motion, is any evidence that Spiezio, in fact, negotiated with the unions representing ROGAN's employees – Local 456 and Local 282, unions that performed work in areas including NYC, or even dealt with a single grievance regarding employees covered by those unions during the limited single employer period. As

[3] GC's avers: "Because R&S Waste was created to operate Rogan Brothers' Westchester County waste hauling operations, and R&S Waste and Rogan Brothers were a single enterprise under Spiezio's control, Rogan Brothers and R&S Waste's interests were entirely aligned from R&S Waste inception through separation, which included the entire proceedings in Rogan Brothers I." GC Brief, p. 5. Obviously, this statement is false since R&S did not have a license to operate in NYC and did not operate in CT whereas ROGAN did. GC has changed the theory of its pursuit of R&S at the final stages of this eight year saga to its detriment. The sleight of hand has opened the ability of R&S to assert the denials and affirmative defenses that GC seeks to strike. For the same reason, GC's statement that "R&S Waste and Rogan Brothers remained a fully integrated single employer throughout the proceedings in Rogan I – sharing identical interests under the singular control of Spiezio" (GC Brief, p. 5) is wrong and provides R&S the ability to properly assert the denials and affirmative defenses GC wants to strike.

such, GC can't credibly say that Spiezio was "in total control" of ROGAN's entire operation during the limited single employer period.

Based on the foregoing, it is simply wrong to state R&S and ROGAN had continuity of operation where the facts show that ROGAN was performing work in Westchester County that neither utilized R&S vehicles or employees during the limited single employer period. This is precisely why the single employer finding of *Rogan II* does not serve as a basis to impose *Rogan I* liability on R&S based upon the *Golden State* successorship doctrine. As such, R&S's affirmative defenses and denials based on these ignored facts are properly advanced and cannot be struck. Consequently, the motion must be denied.

2. *Golden State's* policy concern is not implicated therefore R&S's denials and affirmative defenses are proper.

As set forth *infra*, *Golden State's* policy provenance is that employees who were subject to a ULP will have the ability to obtain the remedy.

The facts adduced during the SDNY show that during the limited single employer period ROGAN had assets to satisfy the backpay obligation – which at that point appears to be *de minimis* at best according to GC's backpay calculations for the *Rogan I* discriminatees. To wit, it operated in New York City and Connecticut and operated its municipal contracts in Westchester County. As such, ROGAN had the ability to remedy the ULPs – GC chose not to do anything to collect from ROGAN in 2011, 2012, 2013, 2014, 2015, 2016, 2017 and 2018 instead it waited to formally raise Golden State successorship in December 2018. GC's lack of diligence should not be rewarded. More importantly, GC's lack of diligence underscores the specious claim that R&S is suddenly responsible for *Rogan I* backpay liability.

Additionally, as the SDNY evidence shows, ROGAN continued to operate independent of R & S long after October 4, 2011. ROGAN, *inter alia*, had vehicles, employees, bank

accounts, customers, and paid approximately $150,000.00 to settle a union benefit funds case. It also appeared to have operated to some extent as ARJR which, upon information and belief, currently operates today. Notably, GC has conspicuously not sought to attach ARJR's assets through an FDCPA gambit or assert *Golden State* successorship liability against ARJR.

The fact is ROGAN had the ability to remedy the ULP subsequent to the limited single employer period. As such, the discriminates could have been compensated from ROGAN, which vitiates the purpose of *Golden State* successorship. And that is why the limited single employer finding does not preclude R&S from raising the affirmative defenses and denials asserted in the Amended Answer. Consequently, the instant motion to strike must be denied.

It most also be recalled that R&S was found not to be the alter ego of ROGAN at any point in time. Since the tests for single employer and alter ego are nearly identical R&S has properly asserted is affirmative defenses and denials in its Amended Answer and the motion to strike must be denied.

POINT V

THERE IS NO LIABILITY THAT ATTACHES TO WASTE SERVICES

Based upon the foregoing, *Rogan I* liability does not attach to R&S. Since that liability does not attach to R&S it cannot attach to Waste Services and the motion for partial summary judgment must be denied.

CONCLUSION

These consolidated cases should not be transferred to the Board because there are material issues of disputed fact which require a trial. Further, there is no basis to strike any portion of Respondents' Amended Answer, or to grant partial summary judgment to Petitioner. The Record before this Agency includes detailed findings, made after a lengthy trial and affirmed by the Board and by the Second Circuit Court of Appeals, that R & S is not the "alter ego" or a "successor" to Rogan Brothers; that R & S was not set up as a sham corporation to continue the business of Rogan under a different name, and that Rogan continued to operate as a separate business after October 4th of 2011. There is no basis under these facts to impute liability under Golden State or any other theory, to R & S, to Waste Services, or to ECSI, for the obligations of Rogan Brothers. As such, Petitioner's motions should be denied in their entirety and Respondents granted such other and further relief as may be just and equitable under the circumstances.

Respectfully submitted,

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